No. 84-633

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

EDWARD K. WHEELER,
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA

and

UNION PACIFIC CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

Whether the Interstate Commerce Commission in approving the merger of The Western Pacific Railroad Company into a wholly-owned subsidiary of the Union Pacific Corporation satisfied its duty, recognized by this Court in *Schwabacher v. United States*, 334 U.S. 182 (1948), to protect the interests of the minority shareholders of The Western Pacific Railroad Company and to insure that the merger terms are just and reasonable.

PARTIES IN THE COURT BELOW

American Train Dispatchers Association

Atchison, Topeka & Santa Fe Railway Company

Brotherhood of Maintenance of Way Employees

Brotherhood of Railway & Airline Clerks

Brotherhood of Railway Signalmen

Chicago & North Western Transportation Company

Denver & Rio Grande Western Railroad Company

International Association of Machinists & Aerospace Workers

Interstate Commerce Commission

Kansas City Southern Railway Company

Louisiana & Arkansas Railway Company

Missouri Pacific Corporation

Missouri Pacific Railroad Company

Pacific Rail System, Inc.

St. Louis Southwestern Railway Company

Southern Pacific Transportation Company

Union Pacific Corporation

Union Pacific Railroad Company

United States of America

United Transportation Union

The Western Pacific Railroad Company

Edward K. Wheeler

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OPINIONS BELOW

The opinion of the Interstate Commerce Commission in Finance Docket No. 30,000, *Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company—Control—Missouri Pacific Corporation and Missouri Pacific Railroad Company* and embraced cases is reported at 366 I.C.C. 459. It is reproduced at pp. 39a-615a of the separately bound appendix to petitions for certiorari ("App."). The opinion of the Court of Appeals denying consolidated petitions for review of that proceeding is reported at 736 F.2d 708, and is reproduced at App. 1a-38a.

JURISDICTION

The decision of the Court of Appeals was issued on May 22, 1984 and timely petitions for rehearing were denied on July 20, 1984. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 2321 and § 2342(5).

STATUTORY PROVISIONS INVOLVED

This case involves the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 11343 and 11344. The pertinent provisions are reproduced at App. 639a and 641a.

STATEMENT OF THE CASE

This petition arises out of a finding by the Interstate Commerce Commission (hereinafter "ICC" or "Commission") that the price offered by a wholly-owned subsidiary of the Union Pacific Corporation (hereinafter "UP"), for the outstanding shares of The Western Pacific Railroad Company (hereinafter "WP"), pursuant to an agreement for merger, was fair and reasonable. As we discuss hereinafter, the Commission's methodology disregarded a significant portion of the value of the WP shareholders' contribution to the merged company and deprived them of just and reasonable compensation for their holdings contrary to the principles embodied in *Schwabacher v. United States*, 334 U.S. 184 (1948). Furthermore, the novel analytical approach adopted by the Commission for use in this case, but which it specifically refused to "prescribe . . . for general use in evaluating the fairness of terms to shareholders" is arbitrary and capricious and an unexplained and impermissible departure from prior norms.

A. Background

Immediately following the divestiture of WP and its subsidiaries by Western Pacific Industries in early 1979, UP, through a subsidiary, purchased approximately 10%

of the outstanding Class A common shares of WP on the open market. Later in the fall of 1979, UP, in order to realize its longstanding strategic objective to gain direct access to the San Francisco Bay area and northern California, inquired whether the WP was for sale. Upon receiving an affirmative response, the railroads conducted further intermittent discussions. These discussions culminated in a meeting held in New York City on the afternoon of January 18, 1980. During the course of that afternoon, the price to be paid by UP for all outstanding WP shares was decided. This figure, which was based solely on WP's "stand alone" value, did not take into consideration either the current value of WP's real estate or the merger benefits that would result by virtue of the merger. Following approval on January 22 by the UP Executive Committee and by the WP Board of Directors, UP mailed to the remaining WP shareholders its tender offer which required the tendering of all shares by March 3, 1980.

B. Proceedings Before the Interstate Commerce Commission

Following the filing of appropriate applications by the railroads seeking the approval of the ICC under the Interstate Commerce Act, 49 U.S.C. § 11343, oral hearings were held. Petitioner and other dissenting shareholders appeared and actively contested the $20.00 per share price being offered by UP for their shares. Thereafter, the ICC issued its decision entitled *Union Pacific Corporation, Pacific Rail System, Inc., and Union Pacific Railroad Company—Control—Missouri Pacific Corporation and Missouri Pacific Railroad Company*, 366 I.C.C. 459 (1982) (App. 39a-615a). After acknowledging its responsibility under *Schwabacher v. United States*, *supra*, 334 U.S. at 201 "to see that the interests of the minority stockholders are protected and that the overall proposal is just and reasonable to those stockholders," the Commission further noted its "duty to see that the minority interests are protected, especially in the absence of arms'

length bargaining or where terms have been imposed by management interests adverse to any class of stockholders." 366 I.C.C. at 635 (App. at 301a).

Having articulated the above principles, the ICC announced its intention to utilize the capitalization of earnings method to determine the value of stock. After disclaiming the significance of equity or book value in the absence of a railroad's liquidation or nationalization, the ICC tersely stated that "land values are of little or no significance in determining the value of stock" 366 I.C.C. at 636 (App. at 302a) and that "the rights of stockholders and the value of their respective stock is to be measured by earnings power." 366 I.C.C. at 336 (App. at 303a).

Upon announcing that the terms of the UP/WP transaction "are just and reasonable" and that it had concluded "that the $20 per share offer falls within a reasonable range of values" (*id.*) for WP stock to be acquired by UP, the ICC began a series of computations to reflect how it had reached its ultimate conclusion, in the course of which, the Commission initially found that WP could be expected to "have a market value of about $67 per share when the merger benefits have been fully realized." 366 I.C.C. at 638 (App. at 304a). It then discounted the $67 per share value for a period of five years to arrive at "a present value at time of consummation of $38 per share." 366 I.C.C. at 638 (App. at 305a).

The Commission then introduced an entirely new concept which it characterized as the "merger premium" and proceeded to manipulate the value further downward. As explained by the ICC, the "merger premium" was the difference in the market value of WP stock immediately prior to UP's tender offer and the present value which the Commission, after discounting, had found to be $38 per share. The Commission next allocated a variable share of the "merger premium" to the WP shareholders, and concluded that the resulting

amounts, when added to the market value of the WP stock before the tender offer, would yield a range of reasonable prices from $16.85 per share to $26.25 per share. Since $20 per share falls within that range, the Commission concluded that $20 per share was fair and reasonable.

Without further explanation of the facts which necessitated use of the curious series of calculations detailed above, the Commission noted that its analysis of the UP offer "is based on the specific facts presented in this proceeding. *We do not prescribe this analytical approach for general use in evaluating the fairness of terms to shareholders.*" [Emphasis added] 366 I.C.C. at 638 (App. at 306a).

C. Proceedings Before the Court of Appeals

Timely petitions for review of the ICC's decision were subsequently filed in the Court below by Wheeler and a number of other parties.[1] In petitioning for review, Wheeler did not ask the court to set aside the Commission's approval of the consolidation. Rather, he only requested the court to "remand the question of the valuation of WP stock back to the Commission for further consideration." 736 F.2d at 726 (App. at 36a).

The Court of Appeals, after concluding "that the Commission's methodology of valuation is reasonable and that its conclusions are supported by substantial evidence" (*id.*) briefly considered certain of petitioner's specific complaints. Focusing on the Commission's treatment of "the merger premium," the court concluded that "the Commission explicitly took into account the enhanced value of WP stock as a result of the consolidation." (*Id.*)

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[1] Wheeler's petition was consolidated by the court with various other petitions filed by competing railroads and rail labor unions. Following the filing of briefs and oral argument, the court issued its *per curiam* opinion in which it affirmed the Commission's decision in all but one respect. See *Southern Pac. Transportation Co. v. I.C.C.*, 736 F.2d 708 (D.C. Cir. 1984), (App. 1a-38a).

The lower court did not address Wheeler's contention that the Commission's action in this regard was an unexplained departure from a long line of Commission precedents and had no basis in the record. The lower court further found that there had been arms' length negotiations between WP and UP and that the Commission had not simply relied on the judgments of WP's financial experts, but had "found that the $20 per share price for WP stock was fair on the basis of its own independent analysis." 736 F.2d at 726 (App. at 36a-37a).

Finally, the lower court, while observing that the Commission's discussion of the issue "is unduly condensed" 736 F.2d at 726 (App. at 37a), sustained the ICC's refusal to consider the current market value of WP's industrial land holdings. Once again the court did not address the issue of whether the Commission's action was an unexplained departure from prior norms as Wheeler contended.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND DEPRIVE PETITIONER OF JUST AND REASONABLE COMPENSATION FOR HIS PROPERTY.

In *Schwabacher v. United States*, 334 U.S. 182 (1948), the Court, in construing the predecessors to Sections 11344 and 11346, held that appraisal rights granted by state law do not survive a merger agreement approved by the ICC as just and reasonable. Noting that "such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable" (*id.* at 201), the Court admonished the Commission, in making its determination, to consider those rights "to the extent that they may affect intrinsic or market values." (*Id.*) As later explained in *Northern Lines Merger Cases*, 396 U.S. 491, 522 (1970), *Schwabacher* "requires that the value of

a shareholder's contribution to a merger be determined in accord with the 'current worth' of his equity." Judged by these standards, the Commission's analysis, which admittedly disregarded the evidence of record concerning the current value of non-transportation lands owned by the WP, is faulty and has resulted in WP shareholders being deprived of just and reasonable compensation reflective of the true value of their contribution to the merged company.

The magnitude of the Commission's error is demonstrated by comparing the total price that UP paid with the total value of the shareholders' contribution. For slightly less than $28 million, UP acquired a Class I railroad with transportation properties conservatively valued in excess of $100 million, current cash and other assets of $75.9 million, and industrial land and non-operating properties with an admitted approximate value of $137 million dollars.[2] When WP's liabilities totalling $150.5 million are subtracted from the value of WP's non-transportation assets alone, it is transparent that UP obtained *all of WP's rail transportation properties (track and operating equipment) for nothing, free of charge, and simultaneously obtained a windfall of non-rail assets currently worth in excess of $60 million.*

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[2] As revealed in the May 2, 1983 Notice of Special Meeting of Shareholders, after UP acquired most of WP's stock in early 1980, the Company sold 929 acres of WP's industrial land having a book value of $1,455,000 and realized a net pre-tax profit of $44,546,000. As of March 31, 1983, WP owned an additional 1,508 acres of industrial and 6,116 acres of non-operating land. As was admitted in the Notice, 450 of the above acres have been appraised and "the current market value of all of such appraised property is substantially greater than its book value and could be in the range of approximately $25 million." In addition, the market value of the remaining non-appraised industrial property and non-operating property was likewise estimated to be "substantially greater than its book value and could be in the range of approximately $65 million."

As explained by the lower court, the I.C.C., in determining the value of the WP's stock, rejected consideration of the market value of WP's industrial landholdings, and determined that the value of WP's "stock can best be measured by WP's earning power, as reflected by performance in the stock market" (736 F.2d at 726 (App. at 37a).[3] The Commission's analysis, which the lower

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[3] In affirming the Commission's reliance on earning power as reflected by stock market performance to measure the value of WP stock, the Court of Appeals relied on Seaboard World Airlines, Inc. v. Tiger Intern. Inc., 600 F.2d 355, 361-62 (2nd Cir. 1979); and Mills v. Electric Auto-Lite Co., 552 F.2d 1239, 1247-1249 (7th Cir. 1977), *cert. denied*, 434 U.S. 922 (1977). These cases embody the principle, as stated in Seaboard, that "when market value [of stock] is available and reliable, other factors should not be utilized in determining whether the terms of a merger [are] fair." (600 F.2d at 361). This principle clashes with the Commission's consistent holdings and practice that market prices, though proper for consideration, are not to be given dominant weight. *See* Louisville & N. R. Co. Merger, 295 I.C.C. 457, 498 (1957); Erie R. Co. Merger, 312 I.C.C. 185, 236 (1960); and Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122, 193 (1963). Hence the cases relied upon by the court to provide a justification for the Commission's reliance on the market place are inapposite.

In any event, both decisions recognize that compelling reasons may exist to depart from the general rule where stock market prices are not predicated on a reliable market which reflects the full gamut of information about the company being traded. It is submitted that the instant situation presents several compelling reasons that would justify such a departure. First, the market was wholly unaware of the current market value of WP's industrial lands during the brief period WP was sold either over-the-counter or on the American Exchange. It was only after the release of the proxy material of May 2, 1983, that the current market value of those lands was disclosed. And, as was acknowledged during the course of the hearing before the ICC, the WP's real estate was not even taken into consideration by UP in establishing its $20.00 per share offer. Second, the market price of WP stock was depressed by the decision of WP management to eliminate dividends and to write down the value of all WP assets immediately following the divestiture from Western Pacific Industries.

court recognized to be "unduly condensed" (736 F.2d at 727 App. at 37a), consists of the wholly unsupported, conclusory statements that "land values are of little or no significance in determining the value of stock" and *are to be considered*, along with equity or book value, "*only in the event of a railroad's liquidation or nationalization.*" [Emphasis added.] *See* 366 I.C.C. at 636 (App. at 302a).[4]

By depriving the WP shareholders of any compensation for the $137,911,000 of land not used in the operation of the railroad but which was transferred to UP, the Commission failed to protect the stockholders' interests and denied them the equivalent of what they were deprived of. While the perfunctory analysis by the Commission may be permissible in some instances, it clearly is unacceptable where the Commission is charged with insuring that a minority shareholder receives the "current worth" of his equity.

It is further submitted that the Commission's decision is an abrupt, unexplained departure from its own past, consistent consideration of industrial land values in evaluating stock exchange ratios in previous rail merger proceedings. *See Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 190 (1963); *Great Northern Pac.—Merger—Great Northern*, 331 I.C.C. 228, 253-260 (1967); *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 331 I.C.C. 643, 679 (1967); *Pere Marquette Ry. Co. Merger*, 267 I.C.C. 207, 241 (1947). Furthermore, this Court has recognized the necessity for the Commission to consider the value of industrial land hold-

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[4] The Commission's further gratuitous observation that "[e]ven assuming that a railroad may be liquidated at some future date, the chances of stockholders recovering book value of their stock are minimal because stockholders very rarely recover book value on liquidation" is belied by the UP's experiences since acquiring the WP shares. *See* Note 2, *supra*.

ings in establishing stock exchange ratios. *See Northern Lines Merger Cases, supra*, 396 U.S. at 516-522; *New Haven Inclusion Cases*, 399 U.S. 392 (1970).[5]

Lastly, it should be noted that consideration of the current market value of WP's industrial lands would be consistent with the standards governing appraisal rights under Delaware law which, were it not for *Schwabacher*, would control.[6] In *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. Supr. 1983), the Delaware Supreme Court recently announced that henceforth the fair value of a stockholder's proportionate interest in a going concern is to be determined by taking "into account all relevant factors." In adopting this standard, the Delaware Court cited with approval its earlier statement in *Tri-Continental Corp. v. Battye*, 74 A.2d 71, 72 (Del. Supr. 1950):

> The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of

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[5] The primary distinction between the instant case and those referred to above is that the stock exchange ratios in those other cases had been the subject of extensive studies and negotiations which lasted several months. As reflected in the *Northern Lines* decision, 396 U.S. at 516-518, the negotiations concerning the stock exchange ratios between the Great Northern and the Northern Pacific centered to a large extent on the value to be attributed to the Northern Pacific's natural resource properties and ultimately led to concessions by both roads concerning the exchange ratios. In the instant case, the negotiations lasted but one afternoon and, as noted above, never focused on the value of the WP's industrial properties.

[6] UP has agreed not to object if the minority shareholders demand appraisal of their shares under Delaware law, and has agreed to pay any appraised value to be determined under Delaware law. However, as noted in the May 2, 1983 "Notice of Special Meeting of Shareholders," "there can be no assurance that a Delaware court will not, on its own initiative, determine that *Schwabacher* denies it jurisdiction over an appraisal proceeding commenced in connection with the merger . . . ."

> the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger. In determining what figure represents this true or intrinsic value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of merger and which throw any light on *future prospects* of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholders' interest, but *must be considered* by the agency fixing the value. [Emphasis added by the Court in original.]

We submit that the above statement, which is wholly consistent with the *Schwabacher* objective, namely that "each class of stockholder receives an equivalent of what it turns in," would require at a minimum the consideration of the current market value of the WP industrial lands.[7] Given the non-operational nature of these indus-

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[7] The Court's attention is also invited to the remarks of one commentator concerning "elements of valuation" in situations involving the valuation of dissenters' stock in an ongoing concern. In rejecting a simple reliance on earnings and market value, the author has explained:

> Asset value is also criticized as a "liquidation" yardstick [footnote omitted] inappropriate because minority stockholders typically have invested for dividend income or stock appreciation and rarely expect to share in the physical assets. Nevertheless, the significance of assets cannot be disregarded. It would be unrealistic to suppose that a company with no earnings, for whose stock there is no measurable market price, is worthless if it has substantial net assets. Moreover, physical appraisal and revaluation of assets—inventories, for example—may uncover values unsuspected by the market. It is not enough to depend on earnings and market value, because data may be incomplete and results can be affected by actions of the

trial lands, it is particularly important that the ICC's failure to consider the market value of WP's industrial lands be corrected and the minority shareholders receive the economic equivalent of what they turned in. Otherwise, this Court's decision in *Schwabacher* may well prevent the WP shareholders from seeking an appraisal under Delaware law with respect to land which has no "continued use . . . in the public calling" of interstate rail transportation.

II. THE COMMISSION'S DECISION IS AN UNEXPLAINED DEPARTURE FROM PRIOR NORMS.

In affirming the ICC's decision, the lower court failed to address petitioner's contention that the Commission, without any explanation, had departed from its prior norms in several respects and had thereby deprived the minority shareholders of just and reasonable compensation for their shares. That the Commission fashioned a unique "analytical" approach to valuation is not open to question. This was admitted by the Commission when it disclaimed its methodology with the bare assertion that "[w]e do not prescribe this analytical approach for general use in evaluating the fairness of terms to shareholders." 366 I.C.C. 638 (App. 306a). Having adopted a special methodology, it was incumbent upon the Commission to explain the underlying reasons or specific facts which compelled the adoption of the new standards for use only in this case. *Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954); *Atchison, T. & S.F. Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973). The Commission did not even try to satisfy this requirement.

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majority or by extraneous pressures. A more reliable result can be reached by comparing at least these three major elements. *Note, Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 Harv.L.Rev. 1453, 1457 (1966).

As reflected in the cases previously referenced,[8] the Commission's conclusory refusal to consider the value of WP's industrial lands is contrary to well-established Commission precedent in fashioning stock exchange ratios in merger proceedings. In affirming the Commission, the lower court erroneously avoided this issue with the statement that "[i]t is true that the Commission's discussion of this issue is unduly condensed."

The Commission deviated without explanation from a prior norm in one other major respect. Although the Commission properly recognized that "the capitalization of earnings method to determine present and prospective worth is a reasonably conventional and generally accepted method for determining the value of stock" 366 I.C.C. at 636 (App. at 301a), it failed to adhere to its customary application of this method. Instead, after capitalizing WP's projected earnings and concluding that $38.00, after discounting, represented the "present value of the stock giving effect to the merger benefits," 366 I.C.C. at 638 (App. at 305a), the ICC introduced its novel "merger premium analysis" which resulted in a double discounting of merger benefits and the Commission's finding the minority shareholders to be entitled to only a fraction of the value of the stock which they are being forced to relinquish.[9] We submit that this adjustment is contrary to the *Schwabacher* requirement that it is the value the stockholder "is contributing to the merger that is to be made good."[10]

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[8] *See, supra,* p. 9.

[9] A thorough review of past Commission cases will not reveal a single instance where the Commission has ever adopted this, or a reasonably similar standard, in order to adjust "the present value of a shareholder's stock" which, under *Schwabacher,* the stockholder is entitled to receive.

[10] The Commission's adjustment is demonstrably in error. The Commission ignored the fact that Applicants' financial studies projecting net income included an allocation by UP of merger benefits between UP and WP. As a result of this allocation of the merger

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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benefits, both UP's and WP's projected earnings following the merger reflected the merger benefits by each railroad. The Commission's analysis fails, however, to recognize this prior allocation by UP of a portion of the merger benefits. By adjusting the value of WP stock to reflect "only" the benefits contributed by WP, the Commission erroneously credited UP with a windfall allocation of the benefits—those UP claimed for itself as well as a substantial portion of those which UP had previously recognized should be allocated to WP.

Since the projected net income of UP and WP, which underlies the Commission's finding that WP stock is worth $38.00 per share, was based upon the traditional 50-50 allocation of benefits which the Commission has consistently used in prior mergers, the Commission's stripping from WP of its share of the merger benefits unreasonably resulted in a substantial understatement of the value of the WP stock.

The Commission's arbitrary reduction of between 10% to 50% of the merger benefits assigned to WP by UP, 366 I.C.C. at 638 (App. at 305a-306a), is an unexplained departure from prior cases. Where friendly mergers between applicants, as here, have previously occurred, the Commission has consistently allocated the future benefits and future system savings equally between the merger partners. *See* Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, *supra* 320 I.C.C. at 192; Florida East Coast Ry. Co. Reorganization, 282 I.C.C. 81, 159 (1951); Louisville & N. R. Co. Merger, *supra* 295 I.C.C. at 497 (1957); Norfolk & W. Ry. Co. Merger, 307 I.C.C. 401, 430 (1959); and Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 330 I.C.C. 780, 801 (1967). In the absence of a reasoned explanation, the ICC should be required to adhere to the same standards that it has traditionally imposed.